Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1269

JOHN L. BARRY, Commissioner of the Suffolk County Police Department,

Petitioner,

against

THOMAS DWEN, as President of the Suffolk County Patrolmen's Benevolent Association and THOMAS DWEN, Individually,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF

LEONARD D. WEXLER
Counsel for Respondent
28 Manor Road
Smithtown, New York 11787
(516) 265-4500

RICHARD T. HAEFELI
Of Counsel

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On writ of certiorari to the United States Court of Appeals for the Second Circuit

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RESPONDENT'S BRIEF

Questions Presented

Does a police department constitute a para-military organization, thereby entitling its head greater discretion than is permitted to the heads of other departments of public employees?

Does an individual's grooming fall within the protection of the constitution thereby requiring the state to justify any attempt to regulate it?

Summary of Argument

Neither the historical nor the legal development of the military and police institutions in our society provides support for the conclusion that police organizations are para-military in character.

Due to the unique position of the military in the constitution as well as the nature of the military, the courts have been extremely reluctant to interfere in military matters.

The police hold no such favored position in the law, and the courts do not hesitate to interfere with police matters.

A review of not only the judicial but legislative history of police in this country establishes that a police organization is part of the civil service system, entitling its members to all of the rights and benefits afforded other civil servants.

Since the choice of personal appearance is part of an individual's personal liberty, any attempt to regulate it must be justified by establishing a sufficient state interest.

The petitioner who had the burden to establish the necessary state interest failed to do so.

ARGUMENT

I

A police organization constitutes a specific department of a municipal or state government, and its members are entitled to the same constitutional protection afforded other civil servant employees of such governmental units.

Although police organizations have been characterized through the years as being either para, semi or quasi-military by the courts, *People* ex rel. *Masterson* v. *French*,

110 N.Y. 494 (1888); *Fraternal Order of Police* v. *Harris*, 306 Mich. 68, 10 N.W.2d 310 (1943); *Doyle* v. *Kammeraad*, 310 Mich. 233, 17 N.W.2d 165 (1945); *Greenwald* v. *Frank*, 70 Misc. 2d 632, 334 N.Y.S.2d 680, affd. 40 A.D. 2d 717, 337 N.Y.S.2d 225, affd. 32 N.Y. 2d 862, 346 N.Y.S.2d 529 (1973); *Stradley* v. *Andersen*, 478 F. 2d 188 (8th Cir., 1973), with the resulting limitation upon the constitutional rights of the members of such organizations, *McAuliffe* v. *City of New Bedford*, 155 Mass. 216, 29 N.E. 517, the historical and legal development of both military and police organizations do not provide support for such a characterization.

The military and police traditions of the United States can be traced as far back in English history as the Assize of Arms 1181 A.D. and Statute of Winchester 1285 A.D.[1]

During this early period the two systems were closely allied,[2] but as time passed each system with the aid of subsequent statutes[3] began to develop its own function in society. The military evolved into a professional organization concerned with the defense of the nation,[4] while the police retained its local character and concern for local matters.[5]

The distinction between the functions of the military and police were retained by the colonists when they arrived in the New World. While they did not create a profes-

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[1] Weigley, History of the United States Army, 3 (1967); W. Lee, *A History of Police in England*, 26 (1901, 1971).

[2] W. Lee, *supra* at 7.

[3] Weigley, *supra* at 3; T. A. Critchley, *A History of Police in England and Wales*, 7 (2d 1972).

[4] Weigley, *supra* at 3-4.

[5] See, W. Lee generally; T. A. Critchley, *supra* ch. 1; Taft and England, Criminology, 318-320 (4 ed. 1964).

sional army, relying upon the militia[6] until the birth of the American Army in June or July of 1775,[7] they were as adamant as the English in long delaying the establishment of a regular police, the first being created in New York in 1844.[8] Just as the historical development of the military is distinct from that of the police, so too is its legal development distinct.

The legal foundation of the military is based upon the United States Constitution. In Article 1 § 8, cl. 11 Congress is granted the power "To raise and support Armies . . .", cl. 13 grants to Congress the power "To make rules for the government and Regulation of the land and naval Forces . . .", and Article 2 § 2 states "The President shall be Commander in Chief of the Army and Navy . . ." There is no reference in the United States Constitution to the establishment of a police force, nor is there such a reference in the New York State Constitution. The legal foundation for the numerous police organizations in New York State is found in either the local laws,[9] or general statutes.[10] This foundation retains the distinction that the military being concerned with the national security is a unified body under the control of one individual, whereas the police organizations are numerous, locally established and controlled, and concerned with local affairs.[11]

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[6] Weigley, *supra* at 4, 8.

[7] Weigley, *id.* at 26.

[8] Taft and England, *supra* at 320.

[9] Suffolk County Charter, Article 12.

[10] N.Y. Executive Law, Article 11; N.Y. Unconsol. Laws, § 5721; N.Y. Village Law, Article 8.

[11] *Ibid.*

Due to the unique position of the military in the Constitution as well as the nature of the military, the Courts have afforded to the military a distinct position in our jurisprudence.

> "Judicial hesitancy when faced with matters touching on military affairs is hardly surprising in view of the doctrine of separation of powers and the responsibility for national defense which the Constitution, Art. 1, § 8, cl. 1 and Art. II, § 2, places upon the Congress and the President." *Hammond* v. *Lenfest,* 398 F. 2d 705, 710 (2d Cir., 1968).

From this deference developed the principle that ". . . Army Regulations, when sanctioned by the President, have the force of law . . ." *U.S.* v. *Freeman,* 44 U.S. 556, 566-567, 3 How. 556, 566-567, 11 L. Ed. 724 (1845); accord, *Billings* v. *Truesdell,* 321 U.S. 542, 551, 64 S. Ct. 737, 88 L. Ed. 917 (1943); *Standard Oil Co. of California* v. *Johnson,* 316 U.S. 481, 484, 62 S. Ct. 1168, 86 L. Ed. 1611 (1942). The rationale for this principle was set forth in *United States* v. *Eliason,* 41 U.S. 291, 301, 16 Pet. 291, 301, 10 L. Ed. 968 (1842):

> "Such regulations cannot be questioned or defined, because they may be thought unwise or mistaken. The right of so considering and treating the authority of the executive, vested as it is with the command of the military and naval forces, could not be intrusted to officers of any grade inferior to the commander-in-chief; its consequences, if tolerated, would be a complete disorganization of both the army and navy."

The courts further developed this special jurisprudence by refusing to entertain jurisdiction to review military matters.

> "The decision, therefore, of a military tribunal acting within the scope of its lawful powers cannot be reviewed or set aside by the courts." *Reaves* v. *Ains-*

worth, 219 U.S. 296, 304, 31 S. Ct. 230, 55 L. Ed. 225 (1911).

In *Orloff* v. *Willoughby,* 345 U.S. 83, 94, 73 S.Ct. 534, 97 L. Ed. 2d 842 (1953), the Court explained the reasoning behind this principle:

> "The military constitutes a specialized community governed by a separate discipline from that of the civilian. Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters."

The police do not hold the same distinct and deferential position in our jurisprudence as the military. Specifically, the acts or actions of the petitioner herein are subject to the same review as the head of any other municipal or civil service department. N.Y. Civil Practice Law and Rules, Article 78; see, *Walker* v. *Murphy,* 15 N.Y.2d 650, 651, 255 N.Y.S. 2d 869, 870 (1964). Although several early New York cases, *People ex rel. Hart* v. *Bd. of Fire Comms.,* 82 N.Y. 358, 360-361 (1880); *People ex rel. Masterson* v. *French, supra,* at 497-498, held review of a commissioner's action was limited, these cases were decided both before the enactment of the present C.P.L.R., Article 78, and its predecessor C.P.A., Article 78, both of which greatly expanded the scope of review. In addition they were decided before the passage of Art. 5, Sec. 9, N.Y. State Constitution in 1894 which provided for a civil service in both the state and municipal governments. The result of this amendment was the assimilation of police organization into the civil service.

A review of judicial decisions affecting the military and police will further establish the special and unique position the military has in our jurisprudence. In *United States ex rel. French* v. *Weeks,* 259 U.S. 326, 42 S. Ct. 505, 66 L. Ed. 965 (1921) and *United States ex rel. Creary* v. *Weeks,* 259 U.S. 336, 42 S. Ct. 509, 66 L. Ed. 973 (1921), a mandamus petition was brought by the petitioners to have them reinstated as officers in the Army after they were administratively retired. In both cases, the court held that it did not have jurisdiction and dismissed the petitions.

In *Radlanszky* v. *Police Commissioner,* 3 A.D. 2d 742, 160 N.Y.S. 2d 555 (1957), the Court annulled the dismissal of the petitioner policeman and restored him to his position, and in *Malara* v. *Monaghan,* 131 N.Y.S. 2d 270 (1954), a probationary patrolman was removed from his position improperly and when the police commissioner refused to reinstate him the court ordered reinstatement.

In *Covington* v. *Anderson,* 487 F 2d 660 (9th Cir., 1973), the petitioner brought an action for declaratory and injunctive relief due to his suspension from flight status with the Oregon National Guard which was motivated by economic necessity. The action was dismissed and affirmed on appeal, the court stating that it did not have jurisdiction to review such an administrative determination. By contrast, the New York courts have not only reviewed but under proper circumstances have reversed a police commissioner's assignment of men. In both *Sheridan* v. *Kennedy,* 19 Misc. 2d 765, 194 N.Y.S. 2d 115, affd. 10 A.D. 2d 606, 197 N.Y.S. 2d 412, affd. 8 N.Y. 2d 794, 201 N.Y.S. 2d 805 (1960) and *Clifford* v. *Police Com'r. of City of New York,* 152 N.Y.S. 2d 923, mod. in other respects 2 A.D. 2d 674, 154 N.Y.S. 2d 115, Mot. for order of reversal as moot. den. 6 N.Y.2d 811, 188 N.Y.S. 2d 198 (1959), the court enjoined the commissioner from assigning policemen to out of grade jobs.

Also, in the area of discipline, the courts will not interfere with a military determination on the grounds that it lacks jurisdiction to do so. *Arnheiter* v. *Chafee,* 435 F.2d 691 (9th Cir., 1971). However, the New York courts have jurisdiction to review police disciplinary matters *Walker* v. *Murphy, supra,* and in appropriate cases will either re-

verse a determination *Radlanszky* v. *Police Commissioner, supra,* or modify the punishment imposed *Truckenbrodt* v. *Smith,* 19 A.D.2d 907, 244 N.Y.S.2d 1013 (1963).

The courts in refusing to interfere in military affairs generally and to review grooming regulations in particular have pointed to the fact that the discipline required in a military organization must be determined by the military and not the courts. *Anderson* v. *Laird,* 437 F.2d 912 (7th Cir., 1971); *Raderman* v. *Kaine,* 411 F. 2d 1102 (2nd Cir., 1969). The same justification was used by the court in *Stradley* v. *Andersen,* 478 F.2d 188 (8th Cir., 1973).

The need for discipline in the military, however, is substantially different from that needed by the police. As far back as the Indian wars in this country it was established that to have a competent and successful military, it was necessary to impose a strong and vigorous discipline upon a soldier[12] in order to insure that he obeys "orders from force of habit on occasions when his natural instinct would impel him to think only of his personal safety, advantage, or honour".[13] To impose the same type of discipline upon police would be counterproductive to the principle that a policeman should be taught to act individually, on his own initiative and under self-control.[14]

In *Parker* v. *Levy,* 417 U.S. 484, 94 S. Ct. 2547, 2556 (1974) this Court recently reemphasized the need for a strict military discipline:

> "'An army is not a deliberative body. It is an executive arm. Its law is that of obedience. No question can be left open as to the right to command in the officer, or the duty of obedience in the soldier'."

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[12] Weigley, *supra* at 23.

[13] W. Lee, *supra* at 402.

[14] *Ibid.*

The court further observed that military society was a society separate and apart from the civilian society and as such is ". . . governed by a separate discipline from that of the civilian, . . ." *Ibid.* In order to govern this distinct society the Court stated:

> "Just as military society has been a society apart from civilian society, so '[m]ilitary law . . . is a jurisprudence which exists separate and apart from the law which governs in our federal judicial establishment.'" *Ibid.*

The police are not separate from the people,[15] but are public servants, serving the entire community.[16] They are also members of the civil service, see, Suffolk County Charter, Art. 12, Sec. 1203; N.Y. Civil Service Law, Sec. 58, and entitled to all of the rights and benefits which said law bestowed on its members.

In addition the members of the Department fall within the definition of public employees as is set forth in Art. 14 of the N.Y. Civil Service Law (commonly referred to as the Taylor Law) and are entitled to and have negotiated collective bargaining agreements through the respondent association, see, *Johnson* v. *Klein,* 75 Misc. 2d 352, 347 N.Y.S. 2d 978, and are presently covered by such an agreement which governs the terms and conditions of their employment. See, Sec. 203, Taylor Law. The benefits of the Taylor Law are not available to members of the New York State Militia, since they are specifically excluded by Sec. 201 sub. 7 (a).

The effect of both the general Civil Service Law and the Taylor Law is that the Police Commissioner no longer has wide discretion in the hiring, firing or assigning of police

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[15] National Advisory Commission on Criminal Justice Standards and Goals, Report on Police, 9, 30 (1973).

[16] W. Lee, *supra* at 328.

officers but is limited as are all other heads of municipalities to comply not only with the law but also the collective bargaining agreement in effect. These limitations placed upon the petitioner and the corresponding rights granted the respondent certainly do not equate with the historically inaccurate and anachronistic classification of police officers being members of a para-military organization.

Police officers are civil servants with the same rights as all other civil servants, and the mere fact that they may have a job which is more hazardous than that of other civil servants is an insufficient reason to classify them as being para-military.

II

The doctrine of comity is not present in this case.

Although the petitioner raises the question of whether the lower courts, in view of the *Greenwald* v. *Frank* decision, should have refrained from deciding the present case based upon this court's decisions in *Younger* v. *Harris*, 401 U.S. 37, 91 S. Ct. 746, 27 L. Ed. 2d 669 (1971); *Hoffman* v. *Pursue, Ltd.*, —— U.S. ——, 95 S. Ct. 1200, 43 L. Ed. 2d 482 (1975), the basis for such restraint is not present. The police departments of Nassau and Suffolk counties are separate and distinct, being organized, operated and controlled by the respective local governments. Each department is independent of the other and the priorities of one may not be the same as the other. The identity of issues and parties which would be a prerequisite for invoking the doctrine of comity is totally absent.

In addition, it should be pointed out that the initial decision in this case rendered in November, 1971, preceded the initial decision in *Greenwald* v. *Frank* (June, 1972) by more than seven months and at the time the present action was commenced there was no pending action either in the courts or on the administrative level.

The case of *McCune* v. *Frank* (2nd Cir. decided 7/16/75 docket # 75-7027), does not strengthen the petitioner's argument, since it involves one of a series of cases instituted by members of the Nassau County Police Department subsequent to *Greenwald* v. *Frank*, in an attempt to gain the same relief the respondent herein had obtained.

III

The petitioner did not sustain his burden of justifying a grooming regulation which impinges upon the constitutional rights of the defendant.

The court of appeals in its original decision properly concluded that "there is a substantial constitutional issue raised by regulation of the plaintiff's hair length" (Pet. App. 16a) and in holding that the "choice of personal appearance is an ingredient of an individual's personal liberty, and that any restriction on that right must be justified by a legitimate state interest reasonably related to the regulations" (Pet. App. 17a).

This decision is in accord not only with a substantial majority of the numerous (a minimum of 30) cases deciding the issue but also with the First, Third, Fourth, Seventh, and Eighth Circuits.[17] See, *Miller* v. *Ackerman*, 488 F.2d 920, 922 (8th Cir., 1973). The unifying thought which appears to run through these circuit decisions is that "Personal liberty . . . includes the freedom to make and act on less significant personal decisions without arbitrary governmental interference" (Pet. App. 17a).

This rationale is not only in accord with Mr. Justice Harlan's dissenting opinion in *Poe* v. *Ullman*, 367 U.S.

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[17] *Richards* v. *Thurston*, 424 F.2d 1281 (1st Cir., 1970); *Stull* v. *School Board of Western Beaver Junior-Senior High School*, 459 F.2d 339 (3rd Cir., 1972); *Massie* v. *Henry*, 455 F.2d 779 (4th Cir., 1972); *Breen* v. *Kahl*, 419 F.2d 1034 (7th Cir., 1969), cert. denied, 398 U.S. 937, 90 S.Ct. 1836, 26 L.Ed.2d 268; *Bishop* v. *Colaw*, 450 F. 2d 1069 (8th Cir., 1971).

497, 543, but the recent decision of this Court in *Cleveland Board of Education* v. *La Fleur,* 414 U.S. 639, 94 S.Ct. 791, 796 (1974), which struck down a school district's maternity leave policy as being an arbitrary interference in the "freedom of personal choice in matters of marriage and family life [which] is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment.".

Although the petitioner questions whether the right of an individual to adopt a personal grooming standard is protected by the constitution, he reserves the main thrust of his argument to the burden of "establishing a genuine public need" (Pet. App. 18a) which the circuit court imposed upon him. This burden is no greater than that imposed upon the school board to justify its maternity leave policy in *Cleveland Board of Education* v. *La Fleur, supra,* at 94 S. Ct. 796.

At the rehearing, the petitioner advanced two arguments to justify the regulation: (1) safety; (2) a uniform appearance promotes morale (Pet. App. 6a). Both issues were considered by the trial court. On the issue of safety the court observed that "The potential danger in hairdress is the ability of the offender to grip the hair and hold the fate of the police officer in his hand. Bulk and length of hair is not regulated. . . . Thus the regulation would permit bulky and lengthy hair on the top of the head, thereby presenting the very problem that was demonstrated." (Pet. App. 7a). The court then found that "No proof was offered to support any claim of the need for the protection of the police officer in the pertinent regulations." (Pet. App. 7a).

As to the issue of uniform appearance and morale the court found ". . . the standards do nothing more than demand uniformity. Uniformity for uniformity's sake does not establish a public need." (Pet. App. 7a-8a). The Court then concluded the "Defendant failed to establish a legitimate state interest . . ." (Pet. App. 8a). These

findings were clearly supported by the evidence and should not be set aside. See, *United States* v. *Oregon State Medical Soc.,* 343 U.S. 326, 332, 72 S. Ct. 690, 96 L. Ed. 978.

The petitioner points to the recent case of *Kamerling, et al.* v. *O'Hagan,* 512 F2d 443 (2d Cir., 1975), in support of his claim that safety is a valid state interest sufficient to sustain the regulation. The attorneys for the respondent in this case also represented the plaintiff in the *Kamerling* case and would point out that the state (N.Y. City Fire Commissioner) introduced sufficient evidence to establish "a genuine public need for the regulation" (Pet. App. 18a).

The respondent does not contend that petitioner can under no circumstances pass a regulation which may infringe upon respondent's personal liberties. It is, however, the respondent's position that the petitioner's burden of justifying such a regulation is no less than that imposed upon any other municipal official.

CONCLUSION

For the reasons set forth above the judgment of the Circuit Court should be affirmed.

Dated: Smithtown, New York, August 15, 1975.

Respectfully submitted,

LEONARD D. WEXLER
Counsel for Respondent
28 Manor Road
Smithtown, New York 11787
(516) 265-4500

RICHARD T. HAEFELI
Of Counsel